FALL 2021 ISSUE 09

Discovery

ATLANTIC EDUCATION AND THE LAW

STEWART McKELVEY
LAWYERS • AVOCATS

INSIDE

Fall is here again, and academic institutions in the region have cautiously welcomed students back to campus. While the Atlantic provinces deal with a fourth wave of the pandemic, our universities have forged ahead with their fall semester and will continue to encounter a range of issues including, but not limited to, the pandemic.

In our ninth issue of Discovery Magazine, Stewart McKelvey lawyers review a number of subjects relevant to Atlantic Canadian universities and colleges, including the CAUT censure process, changes to New Brunswick's *Construction Remedies Act,* immigration policies impacting international students and procedural fairness when addressing private social media posts (featured in both French and English).

Stewart McKelvey is ready to help, and aims to always provide a wide variety of topics for each issue. Please feel free to contact us with subjects you would like this publication to cover in the future.

We hope you enjoy, and wish you continued health and happiness.

- Brittany, Editor

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Evaluating the risks of a CAUT censure

The Canadian Association of University Teachers ("CAUT") censure process has attracted widespread attention in recent months, following CAUT's extraordinary vote in April 2021 to censure the University of Toronto ("U of T"). CAUT censured U of T for terminating the candidacy of Dr. Valentina Azarova, who was the selection committee's top choice for the directorship of the International Human Rights Program at the U of T Faculty of Law. While an external review concluded differently, many participants and observers believe Dr. Azarova's candidacy was terminated because of her previous work on Israel-Palestine, after an alumnus and donor — who is also a Tax Court judge — intervened.

CAUT suspended the censure on September 17, 2021.

This FAQ-style article reviews the background to the censure and the fallout at U of T, and considers the risks for other universities.

In short, the U of T controversy demonstrates that a CAUT censure is not toothless, but can have very real consequences for the educational and professional environment of a university.

WHAT IS CAUT?

CAUT comprises "72,000 teachers, librarians, researchers, general staff and other academic professionals at some 125 universities and colleges across the country."[1] There are multiple classes of CAUT membership,[2] but professionals generally join through their member associations (such as the Dalhousie Faculty Association or the Memorial University of Newfoundland Faculty Association), or by applying for individual membership.[3] CAUT supports members in collective bargaining, grievances and arbitrations, issues of academic freedom, advocacy on academic employment, communications strategy, and other matters.[4]

WHAT IS "CENSURE"?

The CAUT censure is intended to be a rare and last-resort sanction imposed against a university or college administration that, in the view of the CAUT Council, has acted "in a manner that threatens academic freedom and tenure, undermines collegial governance, disregards negotiated agreements, refuses to bargain in good faith, or takes other actions that are contrary to interests of academic staff or compromise the quality and integrity of post-secondary education."[5]

Before imposing censure, CAUT will explore alternative mechanisms to resolve the concern, including a referral to the appropriate CAUT committee for further investigation. If these steps are not satisfactory, the CAUT Executive may recommend to Council that censure be imposed. At that point:

> *If persuaded that a censure is justified, the Council will pass a motion giving notice to the administration concerned that unless the dispute is resolved, censure will be imposed at its next meeting. This action will be publicized within the Canadian academic community. The Association will undertake renewed efforts to settle the dispute, and report progress to the Council. On the basis of that report the Council may decide to impose censure, which will remain in effect until the Council is satisfied that the matter has been satisfactorily resolved.*[6]

A censure involves a blanket request to all CAUT members to not accept appointments, speaking engagements, distinctions, or honours from the censured institution until CAUT's requested changes are made. Further, CAUT will publicize the censure; seek support from student organizations, labour groups, and international academic associations; and refuse to advertise positions at the censured institution.

Prior to the current U of T censure, there had only been two other censures since 1979.[7] The last time censure was invoked was in 2008, over governance issues at First Nations University in Saskatchewan.[8]

HOW DID THE U OF T CENSURE COME ABOUT?

On October 15, 2020, the CAUT Executive passed a censure motion against U of T, in response to its controversial decision the previous month to terminate the candidacy of Dr. Valentina Azarova for the position of Director of the International Human Rights Program at the Faculty of Law.[9] Dr. Azarova was known for her early-career work on Palestinian rights, and more recent work on migrant rights and international criminal law.[10]

[1] CAUT, "About Us".
[2] See generally CAUT By-law Number 1 (November 2020).
[3] CAUT, "CAUT Membership".
[4] CAUT, "Field Guide to CAUT".
[5] CAUT, "Procedures Relating to Censure" (revised 2008).
[6] CAUT, "Procedures Relating to Censure" (revised 2008).
[7] CAUT, "University of Toronto under censure" (May 2021).
[8] CAUT, "CAUT Council imposes rare censure against University of Toronto over Azarova hiring controversy" (April 22, 2021).
[9] Masha Gessen, "Did a University of Toronto Donor Block the Hiring of a Scholar for her Writing on Palestine?" (May 8, 2021) in *The New Yorker,* ["Gessen"].
[10] Gessen, above.

As reported in *The New Yorker:*

> *It emerged that, on September 4th, a high-level university administrator spoke on the phone with David E. Spiro, a tax judge who, individually and as a member of a wealthy family, is a major donor to the law school. Spiro expressed concern about Azarova's work on the Israeli occupation and suggested that her appointment would damage the university's reputation. The university administrator alerted the leadership of the law faculty, who, in turn, contacted the search committee. Soon [Dean of Law Edward] Iacobucci reversed the process of Azarova's hiring.*

The October motion advised that censure would be imposed at the spring meeting of Council, unless "satisfactory steps" were taken by U of T — like hiring Dr. Azarova for the still-vacant director position.[11]

This left several months for negotiations to take place.

During this time, the University tried to stave off censure by retaining the Hon. Thomas Cromwell, retired justice of the Supreme Court of Canada, to conduct an independent review of the hiring situation ("Cromwell Report"). Mr. Cromwell concluded that he "would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate."[12] The Cromwell Report was endorsed by the University, but met with criticism from many corners.[13] (A Judicial Conduct Review Panel of the Canadian Judicial Council has since concluded that, while Justice Spiro "made serious mistakes, these were not serious enough to warrant a recommendation for his removal from office."[14] Several of the complainants have now filed an application for judicial review in Federal Court.)[15]

On April 22, 2021, the CAUT Council voted to censure U of T, on the basis that the cancellation of Dr. Azarova's hiring was politically motivated and a breach of academic freedom.[16] The Council expressly disagreed with the Cromwell Report's conclusion "that the donor's call did not trigger the subsequent actions resulting in the sudden termination of the hiring process."[17]

"The censure amounts to a boycott of the University," according to *Ultra Vires*, the law faculty's student newspaper.[18]

The University of Toronto Faculty Association abstained from the censure vote, and is pursuing two grievances of its own arising from the hiring controversy.[19]

CAUT maintained that censure would "remain in effect until Council is satisfied that the matter has been satisfactorily resolved."[20]

On September 17, 2021, CAUT suspended the censure, after U of T re-offered the directorship to Dr. Azarova.[21] Dr. Azarova declined the offer, telling CBC News that, "In light of events over the past year, I realized that my leadership of the program would remain subject to attack by those who habitually conflate legal analyses of the Israeli-Palestinian context with hostile partisanship."[22] Nevertheless, the development prompted CAUT's Executive Committee to pause the censure "pending a final decision by CAUT Council" in November.[23] CAUT's Executive Committee is still calling on U of T "to resolve all the issues in the case, including explicitly extending academic freedom protections to academic managerial positions and developing policies that prohibit donor interference in internal academic affairs."[24]

WHAT HAVE THE CONSEQUENCES BEEN FOR U OF T?

The censure caused significant fallout,[25] including:

- multiple events being cancelled and speaking invitations declined;
- the Right Honourable Michaëlle Jean, former Governor General of Canada, postponing a lecture on systemic discrimination;
- law faculty resigning from university roles, including Prof. Audrey Macklin resigning as chair of the International Human Rights Program ("IHRP") hiring committee and member of the IHRP faculty advisory committee, and Prof. Kent Roach stepping down as faculty chair of the Advisory Group for the David Asper Centre for Constitutional Rights;
- lawyers refusing to hire U of T law students; and
- outside organizations ending their collaborations with U of T (these include Human Rights Watch; Citizen Lab; the HIV Legal Network; Butterfly: Asian and Migrant Sex Workers Support Network; the Immigration Legal Committee; the Indigenous Education Network; and Amnesty International).[26]

Censure UofT, a group of U of T faculty members that is active on social media, maintained a list of "solidarity statements and actions" in response to the censure.[27]

More repercussions may have ensued if the censure had remained in place during the current academic year.

HOW CAN UNIVERSITIES MANAGE THE RISKS ARISING FROM THE CENSURE PROCESS?

It is in universities' interests to avoid censure if at all possible. For this reason, universities should take the threat of censure seriously, and react proactively rather than defensively if the threat arises.

Universities may want to consider early engagement with CAUT and participation in any CAUT investigations, depending on the circumstances. For example, a complaint about an individual issue may be better suited for grievance arbitration or other processes, whereas more systemic concerns may benefit from engagement with CAUT. Universities may also wish to carefully and proactively consult with their other stakeholders, including student groups, to gauge where they stand on the issues involved and shore up support.

In sum, prevention is key — because once censure happens, it is very difficult to walk back the damage.

CONCLUSION

CAUT cannot necessarily enforce a censure through the courts, but that does not mean a censure is without risk for universities. The reputational cost of attracting a CAUT censure can be readily observed in the case of U of T: there are practical consequences to a censure when it comes to retaining and recruiting faculty, facilitating student employment opportunities, attracting speakers, and beyond. A censure could also have a significant financial impact, depending on how it affects enrolment and donor behaviour.

Especially in the age of social media, risk needs to be assessed holistically — through a communications and public relations lens, and not just a legal lens. It is not simply about whether a censured institution could be sued for damages, but about what might happen in the court of public opinion. In the case of a CAUT censure, the reputational risks can quickly translate into tangible negative impacts on universities, and those who work and study there.

Our Education team is always available to help clients navigate these issues.

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[11] Shree Paradkar, "University teachers' association calls for rare censure of U of T administration over law faculty hiring scandal" (October 15, 2020) in the *Toronto Star*.
[12] Hon. Thomas A. Cromwell, CC, Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law (March 15, 2021) at page 6.
[13] Vivian Cheng and Harry Myles, "Criticisms over the Cromwell Report Erupt with CAUT Censuring U of T" (May 17, 2021) in *Ultra Vires*, ["Cheng and Myles"]. See also Gessen, above.
[14] "Canadian Judicial Council completes its review of the matter involving the Honourable D.E. Spiro" (May 21, 2021).
[15] Aidan Macnab, "Judicial review sought on decision to close complaint against Justice David Spiro" (July 14, 2021) in *Law Times*.
[16] CAUT, "CAUT Council imposes rare censure against University of Toronto over Azarova hiring controversy" (April 22, 2021) ["CAUT censure"].
[17] CAUT censure, above.
[18] Cheng and Myles, above.
[19] University of Toronto Faculty Association, "CAUT Censure: Frequently Asked Question" (May 26, 2021).
[20] CAUT, "University of Toronto under censure" (May 2021).
[21] CAUT, "CAUT calling for 'pause' on U of T censure after U of T reverses course on Dr. Azarova case" (September 17, 2021) ["CAUT pause"].
[22] Shanifa Nasser, CBC News, "Censure against U of T temporarily suspended after school reverses course in hiring controversy" (September 17, 2021).
[23] CAUT pause, above.
[24] CAUT pause, above.
[25] See generally Gessen, above.
[26] Cheng and Myles, above. See also Sarah Tomlinson, "Rye Law Prof Stands with CAUT Censure of U of T Over Hiring Scandal" (September 8, 2021) in *The Eyeopener;* CAUT, "University of Toronto under censure" (May 2021).
[27] Censure UofT, "About Us".

What the government is doing to continue support for international students

With the 2021 fall school semester under way, it has been a year and a half since the COVID-19 pandemic first resulted in school closures and travel restrictions, and forced many students and educational institutions to move to online learning environments. While many schools are re-opening, there are still some students who are unable to study in-person in Canada due to ongoing travel restrictions and study permit processing delays. As discussed in our Spring 2020 and Fall 2020 issues of *Discovery,* Immigration, Refugees, and Citizenship Canada ("IRCC") has been implementing temporary policy changes for those international students studying online, to provide them with flexibility during the pandemic. The government has continued to modify and introduce new measures to support international students:

1. TRAVEL RESTRICTION EXEMPTIONS:

During the COVID-19 pandemic, students coming from outside of the United States have had to meet an exemption to the travel restrictions to be eligible to travel to, and enter, Canada. Initially the Government of Canada had limited the travel exemption for international students to those who held valid study permits or an official approval letter that was issued on or before March 18, 2020. This exemption was modified in late 2020 to broaden who is eligible to travel to Canada.

The travel exemption for international students now has two primary requirements. First, the students must either hold a

valid study permit, be eligible to apply for a study permit at the port of entry, or have received written approval of their study permit application. Second, students must be attending an institution that is listed by the Government of Canada as having appropriate measures in place to support the student's quarantine. This is helpful for international students who received their study permit approvals over the last year and are now seeking to join their schools when on-campus classes resume.

Those who plan to attend an educational institution that is not currently listed by the Government of Canada are not eligible to enter the country under this international student exemption. The institution list is updated regularly and new schools are added frequently, so non-qualifying international students may be able to travel to Canada under this exemption in the future.

Additionally, the Government of Canada has recently implemented a broad exemption to the travel restrictions for fully vaccinated travellers that may also be applicable to some international students. This exemption to the travel restrictions allows individuals who are fully vaccinated to travel to Canada. To be considered fully vaccinated for the purposes of this exemption, individuals must have completed their COVID-19 vaccine dosage regime of an approved vaccine (Pfizer, Moderna, Astra-Zeneca, or Janssen / Johnson and Johnson) at least 14 days before their entry to Canada. While the students should still either have a study permit in-hand or already be approved for the permit, this exemption should make the assessment process simpler for many students.

2. GREATER POST-GRADUATION WORK PERMIT ELIGIBILITY FLEXIBILITY:

In the Spring 2020 and Fall 2020 issues of *Discovery,* we discussed new temporary measures introduced by the Government of Canada to preserve international students' eligibility for a Post-Graduation Work Permit ("PGWP") despite pandemic-related distance and online learning requirements. As a reminder, the PGWP Program provides students who have graduated from certain Canadian educational institutions with a route to obtain an open work permit (otherwise known as a PGWP). Among other requirements, to be eligible for a PGWP, a student would generally need to study in Canada in a program eight months in duration or longer, maintain full-time student status during each academic session, and have held a study permit within 180 days of applying for the PGWP.

Recognizing the impact of COVID-19 on the ability for international students to qualify for this permit, the Government of Canada has made temporary modifications to the PGWP eligibility requirements. To be eligible for the temporary changes discussed below, students must either have a valid study permit, have been approved for a study permit, or have applied for a study permit before beginning their program and have it eventually approved.

Due to the continued processing delays and travel restrictions, many students will need to begin or continue their studies online from outside of Canada. The Government of Canada is temporarily allowing all students who were enrolled in PGWP-eligible programs in progress in March 2020, or who started a program of study from spring 2020 up to and including fall 2021, to complete up to 100 per cent of their program online from outside of Canada without impacting their PGWP eligibility.

Also, PGWPs are generally valid for the same length of time as the study permit, with a minimum length of eight months and up to a maximum length of three years. IRCC is currently allowing any time spent studying online outside of Canada up to December 31, 2021 to be counted towards the length of the PGWP. Any time spent studying outside of Canada after December 31, 2021 will be deducted from the length of the PGWP. It is also important to note that time spent studying outside of Canada only begins to count towards the length of a PGWP once IRCC receives the study permit application.

It was noted in the Fall 2020 issue of Discovery that students who graduate from more than one PGWP-eligible program of study may be able to combine the length of their programs of study (if they are each longer than eight months) when they apply for their PGWP on graduation. IRCC has recently announced that students can now complete 100 per cent of both programs online from outside of Canada if both programs were either in progress in March 2020 or began between spring 2020 and fall 2021.

Finally, while students graduating in Canada are still required to apply for their PGWP within 180 days of holding a valid study permit, and within 180 days of receiving written notification of their program's completion, there are temporary policy changes for graduates outside of Canada. Students who graduate from outside of Canada do not currently need to hold or have held a valid study permit within 180 days of their PGWP application as long as they either have a study permit or study permit approval and apply for their PGWP within 180 days of receiving written notification of their program's completion.

3. ATLANTIC IMMIGRATION PILOT PROGRAM BECOMING A PERMANENT PROGRAM:

The Atlantic Immigration Pilot Program ("AIPP") is a permanent residence pathway that helps employers in Atlantic Canada hire foreign skilled workers who want to immigrate to Atlantic Canada, and international graduates who want to stay in Atlantic Canada after they graduate. There are three subprograms under AIPP, one of which is the Atlantic International Graduate Program.

AIPP is currently in a temporary pilot phase, but the Government of Canada has announced that due to its success it will be made a permanent program. It has yet to be announced whether there will be any changes once the permanent program comes into place, but it is nonetheless exciting news as it provides international graduates in Atlantic Canada with another permanent avenue for applying for residence in Canada.

As we have seen throughout the COVID-19 pandemic, it is possible that these measures may change and new measures may be introduced, depending on how the pandemic progresses.

Our immigration law team would be pleased to provide up-to-date advice on COVID-19 issues impacting educational institutions and international students alike.

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Spotlight

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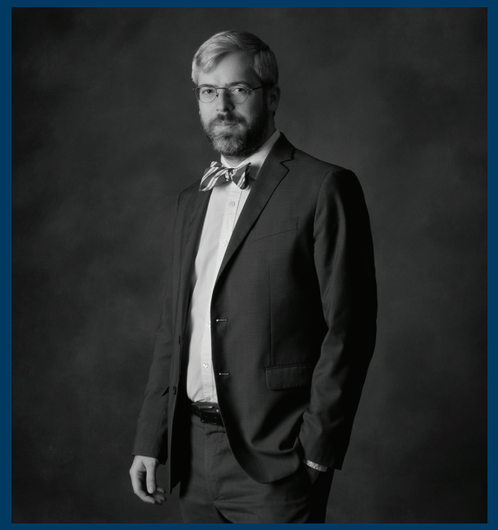

Conor practices in commercial litigation with an emphasis on the construction industry, where he has extensive experience working with general contractors, surety companies, insurers, owners of construction projects, subcontractors and suppliers to help provide practical, efficient solutions. A professional engineer by trade, Conor has represented parties in dispute resolution, drafted and negotiated various forms of contracts and procurement documents, managed complex litigation matters (including one of the longest trials in New Brunswick) and acted in matters concerning professional negligence claims. In addition to his busy practice, Conor is also chair of the Canadian Bar Association – New Brunswick branch construction subsection.

A new era: expanded obligations for owners under New Brunswick's Construction Remedies Act

Construction lien legislation exists in every province and territory in Canada. Liens are a creature of statute introduced, at least in North America, first in the state of Maryland. The concept of early construction liens was intended to combat the issues of bad credit encountered by colonial era material suppliers who faced the new world problem of land owners with abundant land, but little cash and bad credit. Materials were expensive to transport to new remote locations and so, the legislatures of that era created liens to protect material suppliers by giving them a charge against the lands for which materials or services were supplied.

Beginning in 2016 with Ontario, every province, with the exception of Newfoundland and Labrador, has undertaken a review of its lien legislation and most have passed some legislative changes or indicated their intention to do so. New Brunswick's *Mechanics' Lien Act* is the oldest lien act still in force of any of the provinces. The Legislative Assembly of New Brunswick passed new legislation, the *Construction Remedies Act* ("Act"), on December 18, 2020 and the Act, with the exception of several sections, came into force on November 1, 2021, replacing the *Mechanics' Lien Act.*

The new legislation is long – double the length of its predecessor. Most of the fundamental concepts remain the same. However, the Act makes significant changes with respect to entities considered "owners" under the legislation, including introducing new holdbacks provisions and

expansive trust obligations for owners. Most universities and colleges will fall into the category of an owner for both new projects and capital improvements. As of the writing of this article, the sections of the Act dealing with owner holdback trust accounts are being revised. Bill 68 was introduced on November 1, 2021, outlining minor proposed amendments to these sections.

WHY THE NEW HOLDBACK AND TRUST PROVISIONS MATTER

The *Mechanics' Lien Act* creates a statutory trust for all funds paid by owners on a construction project, the beneficiaries of which are the contractors and material suppliers below the owner in the construction pyramid. Importantly, under that legislation an owner is not a trustee of such funds and its obligations are largely limited to retaining the fifteen per cent statutory holdback.

Under the new legislation, the trust provisions have been greatly expanded. The construction trust will extend to owners and there have been significant changes to owners' obligations.

Owners will be required to retain a ten per cent statutory holdback, a reduction from the predecessor legislation, until the expiry of the holdbacks period. In retaining such funds every owner *must* create separate holdbacks trust accounts for *each* improvement where the value of the contract is over $100,000. Further, the owner is required to administer the trust account jointly with the contractor as trustees and, unless ordered otherwise by the court, any payment from a holdback trust account requires the signatures of both trustees.

This is potentially administratively burdensome to owners with several projects happening simultaneously. Owners should expect to track trust information to maintain traceability of trust funds such as:

- Deposits and withdrawals to and from the account;
- Any transfers made for the purposes of the trust;
- The names of parties involved in any transaction regarding the trust; and
- The amount retained as a holdback for each contract.

Perhaps most surprisingly to some, the new legislation makes appropriation or conversion of any part of an owner's trust a category F offence under Part 2 of the *Provincial Offences Procedure Act* which may include a fine of up to $10,200 and a term of imprisonment of up to 90 days.

Further, any director, officer or person, including employees or agents who have effective control of the corporation, who assents to, or acquiesces in conduct, that such persons knew or ought to have known amounts to the corporation committing a breach of trust may be personally liable to the trust beneficiaries. This effectively creates a statutory right for trust beneficiaries to personally sue such persons for breach of trust. Similar sections exist in other jurisdictions and may result in an increased risk of litigation for directors, officers and employees managing the statutory trust.

WHAT TYPES OF PROJECTS DOES THIS APPLY TO?

The new legislation defines an "improvement" in respect of lands as:

(a) any alteration, addition or capital repair to the land,

(b) any construction, erection or installation on the land, or

(c) complete or partial demolition/removal of a building, structure or works on the land.

Importantly, the new legislation also clarifies that capital repairs include any repair intended to extend the normal economic life of the land, building, structure or works but do not include normal preventative maintenance.

The supply of services to an improvement also clearly includes the supply of a design, plan, drawing or specification by an architect or engineer which enhances the value of the land. In other words, owners should maintain the ten per cent statutory holdback on contracts they enter into with their consultants for building projects and capital repairs.

UNIVERSITY OBLIGATIONS MORE EXPANSIVE THAN COLLEGES

Although both colleges and universities may be "owners" of improvements or projects within the meaning of the new legislation, the obligation to maintain a holdback trust account does not apply to the Crown or to local government. Although there is not a "one size fits all" answer, generally community colleges are likely to be deemed the Crown for the purposes of the Act, while the same is not true for universities. This may have a significant impact on a university's obligations under the Act with respect to holdbacks and owners' trusts.

Community colleges in New Brunswick are Crown corporations. They are creatures of statute and subject to the *New Brunswick Community Colleges Act* ("*NBCAA*"). Under section 8 of *NBCAA,* community colleges are clearly defined as agents of the Crown.

Universities in New Brunswick are not subject to legislation similar to the *NBCCA,* are self-governed, and are not expressly legislated as Crown agents under the Act. As such, the expansive definition of improvement makes it likely that universities, which typically make dozens of capital repairs above and beyond $100,000 in the run of a year (e.g. replacing a gymnasium floor, renovations to dormitories, building or modifying laboratories, etc.), will likely be faced with creating and maintaining separate holdback trust accounts for each improvement contract, and will be subject to the corresponding obligations under the Act. Further, as noted above, both the university as a corporation, and those of its individual directors, officers and employees who have responsibility for the management of the holdback trusts, may be held personally liable for appropriation or conversion of any part of the trusts.

HOW STEWART MCKELVEY CAN HELP

Stewart McKelvey can assist universities and colleges with reviewing and drafting procedures and construction contracts to best manage the risks inherent in the new legislation. In the event of a dispute, Stewart McKelvey's dispute resolution team has extensive experience in dealing with all forms of dispute resolution across the Atlantic region and beyond.

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Publications faites dans vie personnelle peuvent égaler manque de professionnalisme dans vie académique : la relation qui existe entre les médias sociaux et les institutions postsecondaires et l'obligation d'équité procédurale

Dans la décision récente et intéressante de Zaki v. University of Manitoba, 2021 MBQB 178 (CanLII), la Cour du banc de la reine du Manitoba a dû étudier l'impact des publications Facebook sur le cheminement professionnel d'un individu dans le milieu universitaire, l'importance d'un tribunal administratif de demeurer impartial et la relation complexe qui existe entre les institutions postsecondaires et le gouvernement.

PUBLICATIONS FACEBOOK– UN MANQUE DE PROFESSIONNALISME?

Dans sa première année comme étudiant à l'école de médecine Max Rady à l'University of Manitoba (« le Collège »), le requérant Rafael Zaki (« Zaki ») a affiché trois publications sur sa page Facebook qui ont éventuellement mené à son expulsion du programme dû au manque de professionnalisme que ses articles et commentaires exhibaient.

Les 12 et 13 février 2019, Zaki a affiché deux publications sur sa page Facebook portant sur le droit des Américains de posséder des armes à feu. Le 17 février 2019, il a publié un essai qu'il avait lui-même écrit intitulé : « Refuting the 'Final Solution' for Undocumented Infants : A Reconciliary Formula ». Cet essai était antiavortement. Parmi les propos faits par Zaki, on lit (traduit de l'anglais) : *« les enfants humains à naître sont considérés comme des esclaves jetables et exécutables selon les caprices et désirs subjectivent de la mère »* et *« l'avortement est immoral et contraire à l'éthique »*.

Le Collège a reçu 18 plaintes anonymes en réponse aux publications Facebook de Zaki. Ces plaintes ainsi que le contenu de ces publications ont soulevé des inquiétudes quant au professionnalisme de cet étudiant de première année, qui était une exigence essentielle chez les étudiants de médecine.

EXPULSION DU REQUÉRANT – LES TRIBUNAUX ADMINISTRATIFS

Le 25 février 2019, le vice-doyen du Collège, Dr Ripstein, et le vice-doyen au professionnalisme, Dr West, ont rencontré Zaki pour adresser leurs inquiétudes. Il a été décidé que Zaki allait écrire une lettre d'excuses à ses collègues de classe (la « lettre »).

Suite à la rencontre, Dr Ripstein a écrit à Zaki lui expliquant les attentes du Collège par rapport à la lettre d'excuses. En avril 2019, Zaki a été avisé que le comité de progrès du Collège (le « CPC »), dont Dr Ripstein était membre, n'était pas satisfait du remords démontré par Zaki dans les ébauches de la lettre et le dossier allait être transmis au comité disciplinaire. À ce même moment, Zaki a été averti que le dossier serait étudié comme étant une « inconduite non-académique » et que le Collège considérait l'expulser ou le suspendre.

Au cours des cinq prochains mois, Zaki a soumis cinq ébauches de la lettre qui ont toutes été rejetées par le CPC qui était d'avis que la lettre n'était pas sincère et manquait d'empathie. Le 30 août 2019, le CPC a expulsé Zaki du Collège.

Zaki a fait appel de la décision du CPC auprès du comité disciplinaire de la faculté des sciences de la santé ainsi qu'auprès du comité disciplinaire de l'université (le « CDU »). Dans les deux cas, la décision de l'expulser du programme a été maintenue. Dans sa décision, le CDU a adressé les questions d'équité procédurale de façon brève. Il a conclu, de plus, qu'il n'avait pas la juridiction de considérer les droits de la personne Zaki en vertu de la *Charte canadienne des droits et libertés* (la « *Charte* »).

APPEL DE LA DÉCISION – COUR DU BANC DE LA REINE

Zaki a fait appel de la décision du CDU auprès de la Cour du banc de la reine du Manitoba. Les questions dont le juge devait adresser étaient les suivantes :

1. Est-ce que l'université avait la juridiction d'expulser Zaki pour avoir fait des publications controversées sur sa page Facebook personnelle?

2. Est-ce que l'université a fait preuve d'équité procédurale?

3. Est-ce que la *Charte* doit être considérée dans un processus de discipline non académique à l'université?

1. Facebook

Le Collège et l'université se sont fiés sur le règlement sur la discipline des étudiants ainsi que la procédure qui l'accompagne pour arriver à la décision d'expulser Zaki. La procédure prévoit que l'on peut discipliner la conduite « non académique » d'un étudiant en relation avec toute question universitaire (*« any university matter »*). Une question universitaire est définie comme étant tout acte, évènement ou engagement qui a un lien étroit avec l'université.

Le juge a conclu qu'il était approprié et raisonnable pour le CDU de considérer les publications Facebook de Zaki comme étant une « question universitaire ». Alors que Zaki tentait d'argumenter que ses publications n'avaient pas un lien étroit avec l'université, la preuve démontrait le contraire.

D'une part, Zaki avait dit aux membres de la faculté de médecine qu'il utilisait son compte Facebook pour se garder à jour avec tout ce qui se passait dans sa classe et au Collège de médecine. De plus, à la fin de certaines publications qui ont mené à toute cette affaire, Zaki a souhaité bonne chance à ses collègues de classe sur leurs examens et a fait d'autres commentaires dirigés à ses collègues. Il était donc tout à fait raisonnable pour le CDU de conclure que les gens visés par ses publications étaient les autres étudiants au programme de médecine.

2. Équité procédurale et crainte raisonnable de partialité

Le juge était d'avis que le CDU avait raison de conclure que Zaki avait bien été avisé de l'enquête ainsi que la charge d'inconduite contre lui dans un délai raisonnable. Le CDU avait aussi raison de conclure que Zaki connaissait l'étendue de la preuve contre lui et il avait eu amplement de temps pour répondre aux allégations.

Le CDU a toutefois fait preuve de manquement en négligeant de considérer, dans sa décision, la crainte raisonnable de partialité causée par le chevauchement de rôles occupés par Dr Ripstein (le vice-doyen du Collège) tout au long du processus disciplinaire.

Le test à rencontrer pour déterminer s'il y a une crainte raisonnable de partialité est de se demander : « À quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Est-ce que cette personne penserait que la décision était juste? » *(Committee for Justice and Liberty et al. v. National Energy Board et al.,* 1976 CanLII 2 (SCC), [1978] 1 SCR 369).

Dans le cas en l'espèce, Dr Ripstein était à la première rencontre avec Zaki suite à la publication de l'essai. Il a ensuite participé à l'enquête et a expliqué à Zaki quelles étaient ses attentes du Collège en lien avec la lettre. Dr Ripstein a reçu les ébauches, les a révisées et les a présentées aux CPC, dont il était membre. La preuve démontrait de plus que depuis le début du processus disciplinaire, le CPC avait conclu que Zaki devait être expulsé du programme de médecine, suggérant un résultat prédéterminé. Le CPC a recommandé que Zaki soit expulsé du programme et Dr Ripstein a participé au processus décisionnel final.

Au moment où Zaki a fait appel de la décision auprès du comité disciplinaire de la faculté des sciences de la santé, Dr Ripstein a soumis une lettre détaillée justifiant la décision du CPC. Le comité disciplinaire a alors rejeté l'appel de Zaki. Cette lettre a aussi été divulguée au CDU lors du deuxième appel avancé par Zaki et la CDU a maintenu la décision d'expulsion sans adresser les divers rôles occupés par Dr Ripstein tout au long du processus disciplinaire.

Le juge était d'avis que ce manquement de la part du CDU en rendant sa décision est une grave lacune et qu'elle donnait l'impression que le CDU a simplement adopté le raisonnement et la décision finale de Dr Ripstein. Cela s'agit d'une crainte raisonnable de partialité qui rend la décision du CDU déraisonnable et incorrecte.

3. Les universités canadiennes – des agents du gouvernement?

Devant le CDU, Zaki, par le biais de son avocat, a argumenté que les publications sur sa page Facebook étaient protégées par la *Charte*. Le comité avait conclu qu'elle n'avait pas la juridiction de considérer une violation de la *Charte*.

En vertu de l'article 32.(1), la *Charte* s'applique au Parlement et au gouvernement, ainsi que la législature et le gouvernement de chaque province, pour tous les domaines relevant de cette législature. La jurisprudence, toutefois, clarifie que la *Charte* peut aussi s'appliquer aux acteurs gouvernementaux et, selon la loi de la province, aux institutions postsecondaires qui agissent comme « agent du gouvernement ».

Dans le cas de Zaki, et en révisant les lois provinciales du Manitoba, le juge a conclu que l'Université du Manitoba n'était pas une entité gouvernementale. Cependant, en suivant le processus de discipline pour les inconduites « non académiques », l'université s'était engagée dans l'élaboration et la mise en œuvre des politiques gouvernementales et donc agissait comme agent du gouvernement. Dans ce contexte, la *Charte* et les droits de Zaki doivent être considérés lors du processus décisionnel. Le fait que le CDU a manqué à ce devoir rend la décision d'expulsion incorrecte et déraisonnable.

RENVOI AU CDU

Malgré les conclusions du Juge Champagne par rapport au caractère biaisé et déraisonnable de la décision du CDU, ce n'est malheureusement pas la fin de l'affaire pour Zaki.

Le dossier sera renvoyé au CDU, qui doit être composé d'un nouveau panel et aura à adresser la crainte raisonnable de partialité et faire preuve d'une évaluation indépendante et objective du dossier. De plus, le CDU aura la tâche difficile de protéger les droits de Zaki en vertu de la *Charte* ainsi que ses propres obligations statutaires.

Il importe de noter que Zaki a continué sa formation au sein du Collège tout au long du processus d'appel et pourra vraisemblablement graduer en 2022 comme prévu.

QUE DOIT-ON RETENIR?

Pour l'étudiant, il est important de comprendre que ce qui est publié sur notre page Facebook personnelle peut entraîner un processus disciplinaire au niveau académique et avoir un effet néfaste sur notre cheminement professionnel. Alors qu'il peut sembler que les réseaux sociaux sont des canaux entièrement séparés et distincts du milieu académique, si la communauté universitaire a accès à ces réseaux, on peut s'attendre qu'il existe un lien étroit entre les actions de l'étudiant sur Facebook et l'université, et cette dernière pourra actionner toutes inconduites de la part de sa population sur ses divers canaux.

Du point de vue de l'université, on ne peut jamais perdre de vue l'importance de demeurer impartiale tout au long du processus disciplinaire et de s'assurer qu'il n'existe pas de chevauchement de rôles chez les personnes responsable de rendre la décision. Si cela ne peut être évité, comme semble être le cas dans *Zaki*, le tribunal administratif doit s'assurer de bien adresser la crainte raisonnable de partialité dans sa décision écrite pour justifier sa conclusion, d'une part, et éviter que la décision rendue soit considérée biaisée, injuste ou déraisonnable.

Finalement, il importe pour l'institution postsecondaire de comprendre les lois qui ont mené à sa création et la relation qui existe entre elle et le gouvernement. Il est clair en lisant la décision de *Zaki* que même si une université est une entité distincte du gouvernement, certaines procédures administratives internes découlant de politiques gouvernementales peuvent faire en sorte que l'université devient un agent du gouvernement et est assujetti aux mêmes obligations, dont la reconnaissance des droits d'un étudiant sous la *Charte*. Cela peut varier de province en province et devra être considéré cas par cas.

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Private posts can lead to a lack of academic professionalism: the relationship between social media and post-secondary institutions and the duty of procedural fairness

In its recent and interesting decision regarding *Zaki v. University of Manitoba*, 2021 MBQB 178 (CanLII), the Court of Queen's Bench of Manitoba had to analyze the impact of Facebook posts on the professional career of a university student, the importance of impartiality of an administrative court, and the complex relationship between post-secondary institutions and the government.

FACEBOOK POSTS – A LACK OF PROFESSIONALISM?

During his first year as a student at the Max Rady College of Medicine ("the College") at the University of Manitoba, the applicant Rafael Zaki ("Zaki") made three posts on his Facebook page which led to his expulsion due to the lack of professionalism of his articles and comments.

On February 12 and 13, 2019, Zaki made two posts on his Facebook page about the right of Americans to bear arms. On February 17, 2019, he posted an anti-abortion essay he had written titled "Refuting the 'Final Solution' for Undocumented Infants: A Reconciliary Formula." In the essay, he argues several points, including the following: "preborn human children are held as disposable and executable slaves to their mother's whims and subjective desires" and "abortion is immoral and unethical."

The college received 18 anonymous complaints about Zaki's Facebook posts. These complaints and the content of his posts raised concerns about the first-year student's professionalism, a requirement for medical students.

THE APPLICANT'S EXPULSION – ADMINISTRATIVE TRIBUNALS

On February 25, 2019, the Associate Dean of the College, Dr. Ripstein, and the Associate Dean of Professionalism, Dr. West, met with Zaki to discuss their concerns. It was agreed that Zaki would write a letter of apology to his classmates.

Following the meeting, Dr. Ripstein wrote to Zaki to explain his expectations for the letter of apology. In April 2019, Zaki was told that the College's Progress Committee ("CPC") was unsatisfied with his apology in the letter and the matter would be transferred to the Disciplinary Committee. Zaki was also told that the matter was being treated as "non-academic misconduct," and the College was considering expulsion or suspension.

Over the following five months, Zaki submitted five drafts of the letter of apology, all of which the CPC rejected because it thought them insincere and lacking empathy. On August 30, 2019, the CPC expelled Zaki from the College.

Zaki appealed the CPC's decision to the Rady Faculty of Health Sciences Local Discipline Committee and the University Discipline Committee ("UDC"). In both cases, the decision was upheld. The UDC briefly addressed Zaki's concerns about procedural fairness. Moreover, it concluded that it lacked the jurisdiction to consider Zaki's rights under the *Canadian Charter of Rights and Freedoms ("Charter")*.

APPEAL AGAINST THE DECISION – COURT OF QUEEN'S BENCH

Zaki appealed against the UDC's decision to the Court of Queen's Bench of Manitoba. The judge had to address the following questions:

1. Does the University have the jurisdiction to expel the applicant for publishing controversial posts on his personal Facebook page?

2. Did the University provide the applicant sufficient procedural fairness?

3. Does the *Charter* apply to the University's non-academic disciplinary procedure?

1. Facebook

The College and the University made the decision to expel Zaki based on the Student Discipline Bylaw and its accompanying procedure. The procedure stipulates that a student's "non-academic" conduct in relation to "any University matter" may be disciplined. A "University matter" refers to any activity, event, or undertaking that has a substantial connection to the University.

The judge concluded that it was appropriate and reasonable for the UDC to consider Zaki's Facebook posts a "University matter." While Zaki claimed his social media posts did not have a substantial connection to the University, the evidence demonstrated otherwise. Firstly, Zaki had told the College that he used his Facebook account to keep up with all things happening in his class and in the College. Moreover, at the end of some of the posts in question, Zaki wished his classmates good luck on their exams and made other comments intended for his classmates. Therefore, it was entirely reasonable for the UDC to conclude that the target audience of Zaki's posts was other students in the program.

2. Procedural fairness and reasonable apprehension of bias

The judge was of the view that UDC was right to conclude that Zaki was provided with timely notice of the investigation and the charge of misconduct brought against him. The UDC was also right to conclude that Zaki knew the scope of the evidence against him and had ample time to respond to the allegations.

However, the UDC failed to consider the reasonable apprehension of bias caused by the overlapping roles played by Dr. Ripstein (the Associate Dean of the College) throughout the disciplinary procedure.

The test to determine whether there is a reasonable apprehension of bias is to ask the question: "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would this person think the decision is fair?" *(Committee for Justice and Liberty et al. v. National Energy Board et al.,* 1976 CanLII 2 (SCC) [1978] 1 SCR 369.

In the case at hand, Dr. Ripstein was the first person to meet with Zaki following the publication of his essay. Dr. Ripstein then was involved in the investigation and explained to Zaki the College's expectations for the letter. Dr. Ripstein received the drafts, revised them, and presented them to the CPC, of which he was a member. The evidence also demonstrated that the CPC had concluded that from the start of the disciplinary process, Zaki should be expelled from the program, which suggests a predetermined decision. Ultimately, the CPC did recommend that Zaki be expelled from the program, and Dr. Ripstein was involved in making the final decision.

Just as Zaki appealed the decision to the Rady Faculty of Health Sciences Local Discipline Committee, Dr. Ripstein sent a detailed letter justifying the CPC's decision. Therefore, the Discipline Committee rejected

Zaki's appeal. This letter was also revealed to the UDC during Zaki's second appeal, and the UDC maintained the decision to expel Zaki without addressing the various roles held by Dr. Ripstein throughout the disciplinary procedure.

The judge was of the view that the failure of the UDC to account for this issue in its decision was a serious flaw and gave the impression that the UDC simply adopted Dr. Ripstein's reasoning and conclusion. This supports a finding of reasonable apprehension of bias and renders the UDC's decision of expulsion unreasonable and incorrect.

3. Canadian universities – government agents?

Before the UDC, Zaki, through his lawyer, argued that his Facebook posts were protected by the *Charter*. The committee had concluded that it lacked the jurisdiction to consider a violation of the *Charter.*

According to Article 32.(1), the *Charter* applies to the Parliament and government, and to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. However, the jurisprudence clarifies that the *Charter* may also apply to government actors and, depending on provincial laws, post-secondary institutions who act as "government agents."

In Zaki's case, the judge reviewed the laws of Manitoba and concluded that the University of Manitoba was not a government entity. However, by following a disciplinary procedure for "non-academic" misconduct, the University was engaged in developing and implementing government policy and, therefore, acted as a government agent. In this context, the *Charter* and Zaki's rights must be considered during the decision process. The fact that the UDC failed to do so renders the decision of expulsion incorrect and unreasonable.

FILE RETURNED TO THE UDC

Despite the conclusions of Judge Champagne about the biased and unreasonable nature of the UDC's decision, the affair is still not over for Zaki.

The file will be returned to the UDC, which must put together a new panel to address the reasonable apprehension of bias and prove evidence of an independent and objective evaluation of the file. Moreover, the UDC will have the difficult task of protecting Zaki's rights under the *Charter* as well as the committee's statutory obligations.

It should be noted that Zaki has continued his studies at the College during the appeal process and is likely to graduate in 2022 as planned.

WHAT CAN WE LEARN FROM THIS?

For students, it is important to understand that what they post on their personal Facebook page could lead to an academic disciplinary procedure and damage their careers. Social media channels may seem completely disconnected from the world of academia, but if university staff and students have access to these networks, we can expect there to be a connection between the students' actions on Facebook and the university, such that universities can act against student conduct. Universities can act against student misconduct.

For universities, representatives should never forget the importance of remaining impartial throughout the disciplinary procedure and ensuring that the roles of those involved in decision making do not overlap. If this cannot be avoided, as was the case in *Zaki,* the administrative tribunal must address a reasonable apprehension of bias in writing to justify its conclusions, and ensure the final decision is unbiased, fair, and reasonable.

Lastly, universities must be familiar with the government policies that lead to their creation, and the relationship that exists between them. Though universities are a separate entity from the government, certain internal administrative procedures resulting from government policy can create a situation where the university is acting on behalf of the government, and therefore becomes subject to the same obligations, including recognizing the rights of a student under the *Charter*. This can vary between provinces and should be considered on a case-by-case basis.

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